Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

CLACKAMAS GASTROENTEROLOGY ASSOCIATES, P.C.,

Petitioner,

v.

DEBORAH ANNE WELLS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Clackamas Gastroenterology Associates, P.C. is a medical clinic formed as a professional corporation but which operates and has legal attributes of a partnership.

The question presented is whether a federal court should apply an economic realities test to determine if the Clinic's physician-shareholders are counted as "employees" for the purpose of determining if the Clinic is a "covered entity" subject to the ADA and other federal anti-discrimination statutes.

In this case, the Ninth Circuit concluded that the physician-shareholders are employees. The court below rejected the holdings of the Seventh, Eighth and Eleventh Circuits which used an economic realities test. Instead, it adopted the reasoning of the Second Circuit which rejected that test.

PARTIES TO THE PROCEEDINGS

Petitioner

Clackamas Gastroenterology Associates, P.C., an Oregon professional corporation. It has no parent corporation; and no publically held company owns ten percent or more of its stock.

Respondent

Deborah Ann Wells.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 271 F. 3d 903 and is reprinted in the appendix hereto at p.1a-10a, *infra*.

The memorandum decision of the United States District Court for the District of Oregon (Panner, D.J.) has not been reported. It is reprinted in the appendix hereto at p.17a-25a, *infra*.

JURISDICTION

The Court of Appeals entered its opinion and order on November 26, 2001. No petition for re-hearing was sought.

On February 15, 2002, Justice O'Connor ordered that the time for filing this petition for writ of certiorari be extended to and including March 26, 2002.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 12101(a)(1), (b)(1) and (2).

(a) ***Findings***
The Congress finds that –

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(b) ***Purpose***
It is the purpose of this chapter –

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

42 U.S.C. § 12111(2), (4), and (5)(A) Definitions under the Americans with Disabilities Act.

(2) Covered entity
The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(4) Employee
The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer

(A) In general
The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this title, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

42 U.S.C. 12112(a) Discrimination under the Americans with Disabilities Act.

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

STATEMENT OF THE CASE

Petitioner is a medical clinic organized as an Oregon professional corporation with four physician-shareholders, who constitute the board of directors. They own the professional corporation and control the management and operation of the medical practice. They each share equally in the profits of the corporation by annual bonuses. Under Oregon law, they remain personally liable for malpractice claims against them, but have limited liability with respect to corporate obligations.

Respondent was, until she voluntarily terminated in May 1997, an employee of the medical clinic. After she terminated, she brought an action against the petitioner under Title I of the ADA, 42 U.S.C. § 12101-12117, and other supplemental state claims.

The clinic moved for summary judgment against Wells' ADA claim on the grounds that it was not an "employer" and, consequently, not a "covered entity" within the meaning of the ADA because it did not have 15 or more employees for the 20 weeks required by the statute. It is undisputed that if the clinic's physician-shareholders are not counted as "employees," then it would have had too few employees to qualify as an "employer." On the other hand, if the physician-shareholders are counted as "employees," then

the number of employees would have exceeded the number required to bring the clinic under the coverage of the ADA.

The District Court applied an economic realities test and found that the four shareholders should be regarded as "partners" and not as "employees" within the meaning of 42 U.S.C. § 12111(4) and (5). The District Court considered conflicting cases from the Second Circuit (*Hyland v. New Haven Radiology Associates, P.C.*, 794 F.2d 793 (2nd Cir. 1986)) which rejected the use of an economic realities test and the Seventh Circuit (*EEOC v. Dowd & Dowd, Ltd.*, 736 F.2d 1177 (7th Cir. 1984)), which used an economic realities test. The District Court found the Seventh Circuit case to be a better-reasoned approach because it exalted substance over form.

The Ninth Circuit reversed in a two-to-one decision with Judge Graber dissenting. The majority found the Second Circuit approach more persuasive, and reversed the judgment of the District Court.

The majority embraced the Second Circuit's reasoning that the use of the corporate form "precludes any examination designed to determine whether the entity is in fact a partnership." *Hyland*, 794 F.2d at 798. The dissent cautioned that the law should be governed by realities, rather than labels. The dissent also observed both that a physicians' professional corporation has many attributes of a partnership as a matter of law, and that the purpose of the 15 employee threshold is to spare very small firms from the potentially crushing expenses of mastering the intricacies of the anti-discrimination statutes. This purpose would be frustrated by the majority's approach, because two clinics, identical in all respects but corporate formality, would be treated differently.

REASONS FOR GRANTING THE WRIT

I. There is a Conflict Among the Circuits Concerning the Use of an Economic Realities Test to Determine Whether a Professional Corporation is a "Covered Entity" for Purposes of the ADA and other Federal Anti-Discrimination Statutes.

The decision of the Ninth Circuit in this case squarely and irreconcilably conflicts with the decisions in the Seventh Circuit, *Dowd & Dowd Ltd.*, (*supra*); the Eight Circuit, *Devine v. Stone, Leyton & Gershman, P.C.*, 100 F.3d 78, 80-81 (8th Cir. 1996);and the Eleventh Circuit, *Fountain v. Metcalf, Zima & Co., P.A.*, 925 F.2d 1398, 1400-01 (11th Cir. 1991).

Under the ADA, it is unlawful for a "covered entity" to discriminate against a qualified individual with a disability on the basis of that disability. 42 U.S.C. § 12112(a). The term "covered entity" includes an "employer." *Id.* §12111(2). An "employer" is defined as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." *Id.* §12111(5)(A). An "employee" is defined as "an individual employed by an employer." *Id.* §12111(4).

Although no circuit has interpreted these specific provisions of the ADA, the court below recognized that there were a number of cases that interpret nearly identical language in other federal employment discrimination statutes, including Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act. It is well recognized that the interpretations found in those cases should apply to all employment discrimination statutes. *See e.g. Serapion v. Martinez*, 119 F.3d. 982, 985 (1st Cir. 1997)("We regard Title VII, ADEA, ERISA, and FLSA as standing in pari passu and endorse the practice of treating

judicial precedents interpreting one statute as instructive in decisions involving another."); *Hyland v. New Haven Radiology Associates, P.C.*, 794 F.2d. 793, 796 (2nd Cir. 1986)(holding that for the FLSA, Title VII, and the ADEA, "Cases construing the definitional provisions of one are persuasive authority when interpreting the others.").

It is generally accepted that those who are properly classified as partners are not "employees" for purposes of the anti-discrimination statutes. *See e.g., Hishon v. King & Spalding*, 467 U.S. 69, 79 (1984). It is also generally accepted that corporate employees are employees under anti-discrimination statutes. *See, e.g., Archer v. Globe Motorists Supply Co., et al.*, 833 F.Supp. 211, 213 (SDNY 1993). However, the status of a shareholder in a professional corporation remains unsettled because its organizational structure is a hybrid of a partnership and a regular corporation.

In *EEOC v. Dowd & Dowd Ltd.*, (*supra*) the Seventh Circuit addressed the specific issue of whether the shareholders of a professional corporation are employees for purposes of the anti-discrimination laws. It applied an economic realities test and concluded that "a shareholder in a professional corporation is far more analogous to a partner in a partnership than it is to the shareholder of a general corporation." *Id.* at *1178*. The court found that the economic reality of a professional corporation is that the management, control and ownership of the professional corporation is much like the management, control and ownership of a partnership. *Id.* The Seventh Circuit's approach was followed by the Eighth Circuit in *Devine*, 100 F.3d at 80-81; and the Eleventh Circuit in *Fountain*, 925 F.2d at 1400-01.

The Ninth Circuit rejected the approach of the Seventh Circuit and refused to apply an economic realities test. Instead, the majority adopted the approach of the Second Circuit in *Hyland v. New Haven Radiology Associates, P.C.* (*supra*). In *Hyland*, the court held that the

use of the corporate form, including professional corporations, "precludes any examination designed to determine whether the entity is in fact a partnership." 794 F.2d at 798. The Second Circuit's position was that once the physicians had chosen a form of business organization, the use of the corporate form precludes any examination designed to determine whether the entity more closely resembles a partnership. *Id.* at *798*.

The approach of the Seventh, Eighth and Eleventh Circuits, which adopts an economic realities test cannot be reconciled with the approach of the Second and Ninth Circuits which rejects an economic realities test on virtually identical facts. There is, therefore, an irreconcilable conflict among the circuits concerning the use of an economic realities test to determine whether a professional corporation is a "covered entity" for purposes of the ADA and other federal anti-discrimination statutes.

This Court should take this case to resolve the conflict among the circuits and to establish a uniform rule. Employers and employees in different parts of the country should not be subject to different standards for determining whether they are subject to the ADA and other anti-discrimination statutes.

II. The Question Presented is Important

The Question Presented has a broad impact on small business throughout this country. Professional corporations with between 15 and 19 or more employees are likely to find themselves caught in the gray zone between small and large employer categories created by the ADA. The impact could go well beyond professional corporations. The same issue can arise with an ordinary corporation. *See e.g., E.E.O.C. v. Pettegrove Truck Service, Inc.*, 716 F.Supp. 1430 (S.D. Fla. 1989) (economic realities test used to determine employee status of a director).

The purpose of the numerical requirement in the ADA is to separate small from large enterprises. Congress decided to "spare very small firms from the potentially crushing expense of mastering the intricacies of the anti-discrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail." *Papa v. Katy Industries, Inc.*, 166 F.3d 937, 940 (7th Cir.)(discussing the Congressional purpose "of exempting tiny employers from the anti-discrimination laws," including the ADA), *cert. denied*, 528 U.S. 1019 (1999).

The U.S. Small Business Administration estimates that in 1999 some 429,718 employers had between 15 and 19 employees. These businesses employed a reported 3,451,611 workers, with an annual payroll of $93,753,309,000 [www.sba.gov/advo/stats/#Firm]. Many, if not most, of these gray-zone employers have owners active in management who share risks and profits, and treat each other as partners in a partnership, just like the petitioners. Many are organized as professional corporations, professional associations, limited liability partnerships, and limited liability companies, all of which may be far more analogous to a partnership than a corporation. In today's business climate, many of these enterprises have multi-state (and, consequently, multi-circuit) economic operations. Therefore, there are a significant number of enterprises affected by the Question Presented.

When Congress passed the ADA in 1990, it found that some 43,000,000 Americans had one or more physical or mental disabilities, and this number was increasing as the population as a whole grows older. 42 U.S.C. § 12101(a)(1). The number of those individuals with disabilities who find themselves applying for work with, or are employed by, a small business, including professional corporations in the gray-zone of 15 to 19 employees, is not insignificant. Because of the split in the circuits, ADA protection varies for those disabled Americans who work for identical firms and clinics across the country. Since the numerical requirement for determining ADA coverage varies among the federal circuits, many disabled Americans enjoy ADA protection based solely

upon their employer's geographic location in one circuit or another.

This inconsistency has a nationwide impact on both employers and disabled Americans. It is unlikely that Congress expected people in one circuit to enjoy a different level of protection than people in another circuit. It is also doubtful that Congress intended ADA coverage of identical small businesses to vary from circuit to circuit. The purpose of the ADA is, in part, to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; and, to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities. 42 U.S.C. § 12101(b)(1) and (2).

Because of the split in the circuits, a small medical clinic in Oregon, like the petitioner, is treated differently under the ADA than an identical medical clinic in the Seventh Circuit, only because of its location. This disparate treatment is unfair and incompatible with the purpose of the ADA.

It is important that the courts provide clear, strong, and consistent enforcement standards so that small businesses, and their employees, are treated equally and fairly in all parts of the country.

III. The Decision of the Court of Appeals is Erroneous

A professional corporation has some attributes of an ordinary incorporated business, but it is not identical and retains attributes of a professional partnership. The use of the word "corporation" in both contexts should not limit a court's analysis.

The Ninth Circuit's approach exalts form over substance. Its analysis stops at the label of "corporation." The majority approach of the Seventh, Eighth, and Eleventh Circuits looks at the true relationships among the individual shareholders, including their method of compensation, their responsibility for the entity's liabilities, and the management structure of the entity to determine if the entity should be treated as a partnership or a corporation. This is, in effect, an economic realities test that eschews labels and instead investigates economic reality. This court adopted such an economic reality test in *Goldberg v. Whitaker House Cooperative, Inc., et al.*, 366 U.S. 28, 33 (1961)(an economic reality test was applied to determine whether home workers were employees).

The reason that Congress limited the ADA's coverage to entities with 15 or more employees is economic. Congress decided that smaller employers should not be required to devote the burdensome time and expense to insure compliance with the ADA and other anti-discrimination statutes. The result of the Ninth Circuit opinion is demonstrated by comparing two clinics. Clinic "A, P.C." (the petitioner) is a "covered entity" for ADA purposes. Next door, clinic "B", which is identical in all respects is not a "covered entity" because its four physicians decided not to adopt the P.C. format. Since the purpose of the 15 employee threshold is economic, it makes no sense to treat clinics A and B differently.

The economic reality of the petitioner is that the shareholders are more analogous to partners in a partnership than to shareholders in a corporation. If an economic reality test were applied, the judgment of the District Court should be affirmed.

Certiorari jurisdiction is warranted to correct this error and clarify the law.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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(Any footnotes trail end of each document)

No. 00-35545

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEBORAH ANNE WELLS,
Plaintiff-Appellant,

v.

CLACKAMAS GASTROENTEROLOGY ASSOCIATES, P.C.,
an Oregon Corporation,
Defendant-Appellee.

September 13, 2001, Argued and Submitted, Portland, Oregon

November 26, 2001, Filed

COUNSEL:
Craig A. Crispin, Portland, Oregon, for the plaintiff-appellant.

Steven W. Seymour, Portland, Oregon, for the defendant-appellee.

JUDGES:
Before: David R. Thompson, A. Wallace Tashima, and Susan P. Graber, Circuit Judges. Opinion by Judge Tashima; Dissent by Judge Graber.

OPINION BY:
A. Wallace Tashima

OPINION:

TASHIMA, Circuit Judge:

Plaintiff-Appellant Deborah Anne Wells appeals from the order of the district court granting summary judgment in

favor of Defendant-Appellee Clackamas Gastroenterology Associates, P.C. (Clackamas) on her claim under the Americans With Disabilities Act of 1990 (ADA). The district court held that Clackamas was not an "employer," and therefore not a "covered entity," within the meaning of the ADA because it did not have 15 or more employees during the relevant time periods. We must decide whether Clackamas' physician-shareholders were "employees" within the meaning of the ADA. We have jurisdiction pursuant to *28 U.S.C. § 1291*, and we reverse.

I. BACKGROUND

Wells was an employee of Clackamas, an Oregon professional corporation, from 1986 until her termination in May 1997. During the relevant time period, four physician-shareholders, all of whom participated in the management and operations of the medical practice, were the shareholders and directors of Clackamas. In addition to the physician-shareholders, 12-15 other persons were employed by Clackamas during this time period.

When Clackamas terminated Wells' employment, she brought an action against Clackmas alleging unlawful discrimination on the basis of disability under Title I of the ADA, *42 U.S.C. § § 12101*-12117, and Or. Rev. Stat. § § 659.436-659.449. She also brought a claim for common law wrongful discharge.

Clackamas moved for summary judgment against Wells' ADA claim, arguing that it was not an "employer "and, consequently, not a "covered entity," within the meaning of the ADA because it did not have 15 or more employees for the 20 weeks required by the statute. It is undisputed that if Clackamas' physician-shareholders are not counted as" employees," then it would have had too few employees to qualify as an "employer." On the other hand, if the physician-shareholders are counted as "employees," then the number of employees would have exceeded the number required to bring Clackamas under the coverage of the ADA. Relying on the "economic realities" test, Clackamas argued that its four physician-shareholders should be regarded as "partners" and

not as "employees" within the meaning of *42 U.S.C. § 12111*(4) & (5).

The magistrate judge accepted Clackamas' argument and recommended that the court grant the motion for summary judgment on the ADA claim and decline to exercise supplemental jurisdiction over the remaining claims. The district court accepted the recommendations of the magistrate judge in their entirety and entered judgment dismissing the action. Wells timely appeals.

II. STANDARD OF REVIEW

We review a district court's grant of summary judgment de novo and must determine whether, viewing the evidence in the light most favorable to the non-moving party, there are any genuine issues of material fact and whether the district court correctly applied the substantive law. *Lopez v. Smith, 203 F.3d 1122, 1131 (9th Cir. 2000)* (en banc).

III. DISCUSSION

Whether shareholders of a professional corporation who are actively engaged in conducting the business of the corporation are "employees" under the ADA is an issue of first impression in this Circuit. Under the ADA, it is unlawful for a "covered entity" to discriminate against a qualified individual with a disability on the basis of that disability. *42 U.S.C. § 12112*(a). The term "covered entity" includes an "employer." Id. § 12111(2). An "employer" is defined as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." Id. § 12111(5)(A). An "employee" is defined as "an individual employed by an employer." Id. § 12111(4).

No circuit has interpreted these specific provisions of the ADA. There are, however, a number of cases that interpret nearly identical language in other federal employment discrimination statutes, including Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act. These same cases also state that their interpretations should apply to all employment discrimination statutes. See e.g., *Serapion v. Martinez, 119 F.3d 982, 985 (1st Cir. 1997)*

("We regard Title VII, ADEA, ERISA, and FLSA as standing in pari passu and endorse the practice of treating judicial precedents interpreting one such statute as instructive in decisions involving another."); *Hyland v. New Haven Radiology Assocs., P. C., 794 F.2d 793, 796 (2d Cir. 1986)* (holding that for the FLSA, Title VII, and the ADEA, "cases construing the definitional provisions of one are persuasive authority when interpreting the others").

In *EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177 (7th Cir. 1984)*, the Seventh Circuit applied an "economic realities" test and concluded that "a shareholder in a professional corporation is far more analogous to a partner in a partnership than it is to the shareholder of a general corporation. " *Id. at 1178.* On this basis, the court concluded that because they are "really" partners, shareholders in professional corporations are not to be counted as employees for purposes of federal employment discrimination law. Id.

This approach was rejected by the Second Circuit in Hyland. In Hyland, the court held that the use of the corporate form, including a professional corporation, "precludes any examination designed to determine whether the entity is in fact a partnership." *794 F.2d at 798.* The incorporators of a professional corporation make a deliberate decision to adopt the corporate form for their business in order to avail themselves of important tax, employee benefit, and civil liability advantages. Id. Having freely made the choice to adopt this form of business organization "they should not now be heard" to say that their firm is "essentially a medical partnership," and not a corporation. Id.

Given the broad purpose of the ADA, see *42 U.S.C. § 12101*, we find Hyland's reasoning to be considerably more persuasive than Dowd's. Because the decision to incorporate is presumably a voluntary one, there is no reason to permit a professional corporation to secure the "best of both possible worlds" by allowing it both to assert its corporate status in order to reap the tax and civil liability advantages and to argue that it is like a partnership in order to avoid liability for unlawful employment discrimination. Therefore, following the Second Circuit's reasoning in Hyland, we hold that

Clackamas' shareholder-employees should be counted as" employees" under the ADA and "that any inquiry respecting partnership status [is] irrelevant." *Hyland, 794 F.2d at 798.*

Clackamas contends that *Strother v. Southern California Permanente Medical Group, 79 F.3d 859 (9th Cir. 1996)*, directs the court to use the "economic realities test" in this case. Strother, however, is distinguishable from this case and does not address the split between Dowd and Hyland regarding the status of shareholders of a professional corporation. In Strother, a case arising under state law, we held that partners can, under appropriate circumstances, be deemed to be employees for the purposes of the employment discrimination laws.

It is one thing to apply an "economic realities "test to determine that a nominal partner should, under appropriate circumstances, be considered an "employee" in order to prevent a firm from labeling the bulk of its employees as partners simply to insulate itself from liability for discrimination. It is quite another thing, however, to apply the "economic realities" test in order to classify shareholder-employees of a corporate enterprise as partners. See *Hyland, 794 F.2d at 798.* While the shareholders of a corporation may or may not be "employees," they can never be partners in that corporation because the roles are "mutually exclusive." Id.

In the case at bench, the status of Clackamas' four physician-shareholders as employees is clear. During the relevant time periods, in addition to being shareholders and directors of Clackamas, the four physician-shareholders actively participated in the management and operation of the medical practice and literally were employees of the corporation under employment agreements. Therefore, the physician-shareholders of Clackamas should be regarded as" employees" within the meaning of *42 U.S.C. § 12111*(4) & (5); consequently, Clackamas had a sufficient number of employees to qualify as an "employer" and as a "covered entity" under the statute.

IV. CONCLUSION

Because we conclude that Clackamas' physician-shareholders are employees of the corporation, not partners in it, the district court's grant of summary judgment in favor of Clackamas is reversed and the case is remanded for further proceedings consistent with this opinion.

REVERSED and REMANDED.

DISSENTBY:
Susan Graber Susan Graber . Graber

DISSENT:

GRABER, Circuit Judge, dissenting:

I respectfully dissent. For three reasons, *EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177 (7th Cir. 1984)*, expresses the more persuasive approach in the context of this case:[1] (1) our circuit has cautioned against being governed by labels, rather than realities; (2) a physicians' professional corporation in Oregon has many attributes of a partnership as a matter of law and is not merely an ordinary commercial corporation; and (3) the purpose of the numerical requirement in the ADA is to separate small from large enterprises, not to adhere to the vagaries of tax law or tort liability. Like the district court, I would apply the "economic realities" test and would conclude that Defendant's physician-shareholders were not" employees" within the meaning of the ADA.

1. The Significance of Strother

In *Strother v. Southern California Permanente Medical Group, 79 F.3d 859, 865-68 (9th Cir. 1996)*, we held that "partners" can be considered "employees "under a state anti-discrimination statute that borrowed concepts from federal law. There, a partner in a medical partnership consisting of more than 2,000 partners had sued the medical partnership. The district court held that the plaintiff could not maintain the action because she was a partner in the defendant entity and was a party to its partnership agreement. We reversed, holding that the plaintiff should have an opportunity to prove

that she was functionally an employee (for example, had neither the power nor the duty to participate in the management and the control of the defendant firm), rather than a partner in the normal sense. *Id. at 867-68.* We noted, for example, that the defendant entity was controlled by a board of directors over which the plaintiff exercised "little control and to which she [had] limited access." *Id. at 867.*

Although I agree that Strothers is not controlling here, it at least suggests that economic realities are more important than labels. That principle should remain true when the shoe is on the defendant's foot.

Indeed, even the Second Circuit has backed away a bit from the bright-line test suggested by *Hyland v. New Haven Radiology Assocs., P. C., 794 F.2d 793 (2d Cir. 1986).* In a later case, the Second Circuit observed that, although the shareholders of a professional corporation cannot be considered partners, it does not follow that every such shareholder also is an "employee" of the professional corporation. *EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529, 1538 (2d Cir. 1996).* For example, if a shareholder sits on the board of directors but is not involved in the day-to-day management or operation of the firm, then the shareholder is more akin to an "employer," rather than being an "employee. "Id. This case brought the Second Circuit's approach somewhat closer to the Seventh Circuit's. See *Chavero v. Local 241, 787 F.2d 1154, 1157 (7th Cir. 1986)* (holding that members of the board of directors are not employees unless they "perform traditional employee duties"); *Zimmerman v. N. Am. Signal Co., 704 F.2d 347, 352 (7th Cir. 1983)* (holding that directors and "unpaid, inactive officers" are not corporate "employees"). In other words, "economic realities" play some role even in the Second Circuit, and Strother counsels that economic realities should play a major role in the Ninth Circuit.

2. The Nature of This Professional Corporation

A professional corporation has some attributes of an ordinary incorporated business, but it is not identical and retains attributes of a professional partnership. The use of the

word "corporation" in both contexts should not constrain our inquiry.

In Oregon, a physicians' professional corporation, like this one, preserves the professional relationship between the physicians and their patients, as well as the standards of conduct that the medical profession requires. Or. Rev. Stat. § 58.185(2). Further, "a shareholder of the corporation is personally liable as if the shareholder were rendering the service or services as an individual" with respect to all claims of negligence, wrongful acts or omissions, or misconduct committed in the rendering of professional services. Or. Rev. Stat. § 58.185(3) (emphasis added). A licensed professional also is jointly and severally liable for such claims, albeit with some dollar limitations. Or. Rev. Stat. § 58.185(4)-(9). Ordinary business corporation rules apply only to other aspects of the entity, apart from the provision of professional services. Or. Rev. Stat. § 58.185(11). A professional corporation's activities must remain consistent with the requirements of the type of license in question, Or. Rev. Stat. § 58.205, and it may merge only with other professional corporations, Or. Rev. Stat. § 58.196, so the provision of professional services – with its attendant liabilities – must remain at the heart of a P.C. like this defendant.[2]

Additional special rules apply to professional corporations that are organized to practice medicine, none of which apply to ordinary business corporations. A majority of the directors, the holders of the majority of shares, and all officers except the secretary and treasurer must be Oregon-licensed physicians. Or. Rev. Stat. § 58.375(1)(a)-(c). The Board of Medical Examiners is given express statutory authority to require more than a majority of shares, and more than a majority of director positions, to be held by Oregon-licensed physicians. Or. Rev. Stat. § 58.375(1)(d) & (e). The Board of Medical Examiners also may restrict the corporate powers of a professional corporation organized for the purpose of practicing medicine, beyond the restrictions imposed on ordinary business corporations. Or. Rev. Stat. § 58.379. Lastly, Or. Rev. Stat. § § 58.375 through 58.389 contain impediments to the transfer of shares and other corporate activities.

In short, even without considering the economic realities of this particular P. C., it is apparent that a physicians' professional corporation in Oregon retains important legal aspects of a partnership. On this record, it also is clear that the four physician-shareholders are the Defendant entity's directors, participate in the management and operation of the entity's medical practice, attend monthly management meetings, and share profits from the professional corporation through an annual bonus system. Because they in fact exercised full control over the medical practice, shared profits, and remained jointly and severally liable to patients on medically related claims, the physician-shareholders should be classified as partners, rather than employees.

3. The Reason for the ADA Classification

The apparent reason for limiting the ADA's coverage to entities with 15 or more employees in each of 20 or more calendar weeks in the current or preceding calendar year, *42 U.S.C. § 12111*(5)(A), is to divide larger businesses from smaller ones. Congress decided "to spare very small firms from the potentially crushing expense of mastering the intricacies of the antidiscrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail." *Papa v. Katy Indus., Inc., 166 F.3d 937, 940* (7th Cir.) (discussing the congressional purpose" of exempting tiny employers from the antidiscrimination laws," including the ADA), cert. denied, *528 U.S. 1019, 145 L. Ed. 2d 408, 120 S. Ct. 526 (1999)*; see also *Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993)* (recognizing that Congress exempted small employers from the ADEA and Title VII of the Civil Rights Act in order to protect them from "the costs associated with litigating discrimination claims").[3]

The result of the majority's opinion is that Clinic # 1, this defendant, is a "covered entity" for ADA purposes, while Clinic # 2 next door, which is identical in all respects except in its four physicians' decision not to adopt a P.C. format, is not a covered entity. Because the very purpose of the 15-employee threshold is economic, it makes no sense to treat Clinic # 1 and Clinic # 2 differently.

4. Conclusion

In my view, the Ninth Circuit should adopt the majority rule – an "economic realities" test – to determine whether a shareholder in a professional corporation is an" employee" within the meaning of the ADA. As Plaintiff and the panel majority acknowledge, if we applied that test to this case we would have to affirm the judgment of the district court. I therefore dissent from the decision to reverse and remand.

Footnotes

[1] The other circuits that have examined this question have followed the Seventh Circuit's approach in Dowd: *Devine v. Stone, Leyton & Gershman, P.C., 100 F.3d 78, 80-81 (8th Cir. 1996); Fountain v. Metcalf, Zima & Co., P.A., 925 F.2d 1398, 1400-01 (11th Cir. 1991).* It appears that no circuit other than the Second has adopted the Hyland approach.

[2] In Oregon, the distinction between partnerships of professionals and professional corporations is diminishing further. Oregon is currently phasing in a new set of statutes that will govern all Oregon partnerships after January 1, 2003. 1997 Or. Laws, ch. 775, § 84. Under Or. Rev. Stat. § 67.105(4), the liability of partners in a limited liability partnership of professionals will be governed by professional-corporation law:

> Notwithstanding subsection (3) of this section, the partners of a limited liability partnership who are professionals shall be personally liable in their capacity as partners to the same extent and in the same manner as provided for shareholders of a domestic professional corporation under ORS 58.185 and 58.187 and as otherwise provided in this chapter.

The fact that the law governing business entities is subject to a change that will result in having two differently named business structures share significant common features (as well as the fact that the law of business organizations varies from state to state) is an additional reason to adopt an

"economic realities" test instead of one that relies solely on labels.

[3] Additionally, Congress made a judgment about how large a business has a presumed effect on interstate commerce.

Civil No. 99-406-AS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DEBORAN ANNE WELLS,
Plaintiff,

v.

CLACKAMAS GASTROENTEROLOGY ASSOCIATES PC,
an Oregon corporation,
Defendants.

Filed May 5, 2000

ORDER

Magistrate Judge Donald C. Ashmanskas filed his Findings and Recommendation on March 22, 2000. The matter is now before me pursuant to 26 U.S.C. § 636(b) (1) (B) and Fed. R. Civ. P. 72(b). When either party objects to any portion of the Magistrate Judge's Findings and Recommendation, the district court must make a de novo determination of that portion of the Magistrate Judge's report. 28 U.S.C. § 636(b) (1) (C); McDonnell Douglas Corp. v. Commodore Business Machines, Inc., 656 F. 2d 1309, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982).

Plaintiff has filed timely objections. I have, therefore, given the file of this case a novo review. I ADOPT Magistrate Judge Ashmanskas's Findings and Recommendation. Defendant's motion (#9) for summary judgment, with respect to plaintiff's First Claim f or Relief, is granted. The remainder of defendant's summary judgment motion is denied as moot. Plaintiff 's Second and Third Claims for Relief are dismissed without prejudice.

IT IS SO ORDERED.

DATED this 5, day of May, 2000.

OWEN M. PANNER
U.S. DISTRICT COURT JUDGE

No. 00-35545

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEBORAN ANNE WELLS,
Plaintiff-Appellant,

v.

CLACKAMAS GASTROENTEROLOGY ASSOCIATES PC,
an Oregon corporation,
Defendant-Appellee.

DC# CV-99-00406-DCA
District of Oregon
(Portland)

Filed September 12, 2000

ORDER

This case is not selected for inclusion in the mediation program. Counsel are requested to contact the mediator should circumstances develop that might warrant further settlement discussions.

The briefing schedule previously established by the court remains in effect.

Chris Goelz
Circuit Mediator

9/11/00/cg

No. 00-35545

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEBORAN ANNE WELLS,
Plaintiff-Appellant,

v.

CLACKAMAS GASTROENTEROLOGY ASSOCIATES PC,
an Oregon corporation,
Defendant-Appellee.

DC# CV-99-00406-DCA
District of Oregon
(Portland)

Filed July 12, 2000

ORDER

This case is under consideration for inclusion in the mediation program. Within 14 days of the date of this order, counsel for all parties intending to file briefs in this matter are requested to inform Chris Goelz, Circuit Mediator, at Chris_Goelz@ca9.uscourts.gov (or by fax 206/553-4767) of their clients positions on whether the case is appropriate for mediation, whether the court should schedule an assessment conference, and whether the court could take other steps to facilitate settlement of the dispute. This communication will be kept confidential from the court and. if requested from the other parties in the case. The existing briefing schedule remains in effect.

Contact information and the procedures governing the mediation program are set out in the attached memorandum. Counsel should read the memorandum and provide a copy to their clients.

FOR THE COURT:
Lynn Warton Deputy Clerk

7/12/00/lw

Civil No. 99-406-AS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DEBORAN ANNE WELLS,
Plaintiff,

v.

CLACKAMAS GASTROENTEROLOGY ASSOCIATES PC,
an Oregon corporation,
Defendants.

Filed June 2, 2000

JUDGMENT OF DISMISSAL

OWEN M. PANNER, District Judge:

Consistent with the Order (# 43) of this court, filed May 5, 2000, adopting the Findings and

Recommendation (# 37) by U.S. Magistrate Judge Donald C. Ashmanskas, filed March 22, 2000, IT IS ORDERED and ADJUDGED that Plaintiff's case is DISMISSED with prejudice.

Pending motions, if any, are DENIED as moot.

DATED this 31, day of May 2000.

OWEN M. PANNER
U.S District Court Judge

Civil No. 99-406-AS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DEBORAN ANNE WELLS,
Plaintiff,

v.

CLACKAMAS GASTROENTEROLOGY ASSOCIATES PC,
an Oregon corporation,
Defendants.

Filed March 22, 2000

FINDINGS AND RECOMMENDATION

ASHMANSKAS, Magistrate Judge:

Plaintiff Deborah Wells brings this action against defendant Clackamas Gastroenterology Associates, P.C., her former employer. Plaintiff brings claims under the Americans With Disabilities Act (ADA), 42 TJS.C. § 12101 seq. and O.R.S. § 659.436, alleging that defendant unlawfully discriminated against her by refusing to reasonably accommodate her alleged disability and by terminating her employment. She also brings a claim for wrongful discharge. Presently before the court is defendant's motion for summary judgment.

STANDARDS

Summary judgment is only appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law Fed. R. Civ. P. 56(c). The moving party must show the absence of an issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1936). The moving party must support the summary judgment motion with affidavits made on personal knowledge, pleadings, depositions, answers to interrogatories

or admissions by party opponents sufficient to set forth all material facts required for summary judgment. Id. If the moving party adequately supports the motion, the adverse party may not rest upon the pleading, but must respond with affidavits made on personal knowledge, pleadings, depositions, answers to interrogatories or admissions by party opponents sufficient to demonstrate a genuine issue for trial. Id. at 322-23.

Reasonable doubts regarding the existence of a genuine issue of material fact arc resolved against the moving party. United States ex. Rel. Anderson v. Northern Telecom, Inc., 52 F.3d 810, 815(9th Cir. 1995). Inferences drawn from facts are viewed in the light most favorable to the non-moving party. Id.

A scintilla of evidence, or evidence that is merely colorable or not significantly probative, does not present a genuine issue of material fact. United Steelworkers of America v. Phelps Dodge Corp., 865 F.2d 1539, 1542 (9th Cir. 1989), cert. denied, 493 U.S. 809 (1989). No genuine issue for trial exists where the record as a whole could not lead the trier of fact to find for the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

The substantive law governing a claim determines whether a fact is material. Anderson v, Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Only disputes over facts that are relevant to an element of a claim or defense or whose existence might affect the outcome of the suit will properly preclude the entry of summary judgment. Id.

DISCUSSION

Defendant moves for summary judgment arguing, among other things, that defendant was not covered by the ADA during the relevant time period.

Under the ADA, it is illegal for a "covered entity" to discriminate against a qualified individual with a disability.

42 U.S.C. § 12112(a). An "employer" is one type of "covered entity." 42 U.S.C. § 12111(2). An "employer" must have 15 or more employees in each of 20 or more calendar weeks in the current or preceding calendar year. 42 U.S.C. § 1211 1(5)(A). An "employee" is defined as "an individual employed by an employer." 42 U.S.C. § 12111(4). Thus, in order for defendant to be covered by the ADA, it must have had 15 or more employees for 20 or more weeks during 1996 or 1997.

During the relevant time period, defendant was a professional corporation with four physician shareholders. It is undisputed that if the physician shareholders are not counted, defendant had 15 employees for only 10 weeks in 1996 and for only 8 weeks in 1997. In such a case, defendant would not be a "covered entity." Thus, the issue before the court is whether the physician shareholders of a professional corporation are "employees" under the ADA.

Plaintiff urges that a different test should be used to determine who is an employee under the ADA, depending upon whether the inquiry is coverage or the right to sue. I disagree. The ADA contains only one definition of "employee," and no indication that a different test should be used for coverage and the right to sue. Also, if different definitions were used, inconsistent results would be possible an individual who finds himself an "employee" for purposes of coverage, but with no right to sue, or vice versa). My conclusion is buttressed by an unpublished opinion from the Ninth Circuit that used the economic realities test[1] to differentiate between an employee and independent contractor for purposes of coverage under federal employment discrimination laws. Miller v. Lifestyle Creations, Inc., 993 F.2d 883, 1993 WL 173724 (9th Cir. 1993).

It is generally accepted that those who are properly classified as partners are not "employees" for purposes of the antidiscrimination statutes. See, Hishon v. King& Spaulding, 467 U.S. 69, 79 (1984); Burke v. Friedman, 556 F.2d 867, 869 (7th Cir. 1977). It is also generally accepted that corporate employees are employees under antidiscrimination statutes.

See, e.g., Archer v. Globe Motorists Supply Co., 833 F. Supp. 211, 213 (S.D.N.Y. 1993). However, the status of a shareholder in a professional corporation remains unsettled because its organizational structure is somewhere between a partnership and a regular corporation.

The Ninth Circuit has not addressed the specific issue of whether the shareholders of a professional corporation are employees for purposes of the antidiscrimination laws. It has, however, looked at the issue of whether under some circumstances a partner can be an employee. In Strother v. Southern California Permanente Medical Group, 79 F.3d 859 (1996), the Ninth Circuit considered whether a physician labeled as a partner can be considered an employee for purposes of bringing suit under federal employment discrimination laws. The court found that, in determining whether a partner can be an "employee," the court must

> analyze the true relationship among partners, including the method of compensation, the "partner's" responsibility for partnership liabilities, and the management structure and the "partner's" role in that management, to determine if an individual should be treated as a partner or an employee for the purpose of employment discrimination laws.

79 F.3d at 867.

In Strother, the medical partnership in which plaintiff was a partner had 2400-2500 partners. The affairs of the partnership were conducted predominantly by a board of directors, over which the plaintiff had little control and to which she had limited access. Her compensation was determined by her performance, and she could be disciplined for poor performance. Thus, the court remanded to the district court, finding that plaintiff must be given the opportunity to demonstrate that "her actual partnership rights are limited enough that she should be characterized as an employee." 79 F.3d at 868.

Other circuits have looked at the specific issue of whether shareholders in a professional corporation are "employees" for purposes of the antidiscrimination laws, and have come to differing conclusions. For example, in Equal Employment Opportunity Commission v, Dowd & Dowd. Ltd.. 736 F.2d 1177 (7th Cir. 1984), the court applied an economic realities test and determined that shareholders in a professional corporation engaged in the practice of law are not employees for purposes of federal employment discrimination laws. The court concluded that the role of a shareholder in a professional corporation is far more analogous to a partner in a partnership than it is to a shareholder of a general corporation. Id. at 1178. The court found that the economic reality of a professional corporation is that the management, control and ownership of the corporation is much like the management, control and ownership of a partnership. Id.

However, in Hyland v. New Haven Radiology Associates, 794 F.2d 793 2nd Cir. 1986), the district court applied an economic realities test and determined that the physician shareholders in a professional corporation were not employees for purposes of the federal employment discrimination laws. The circuit court reversed, and found the physician shareholders to be employees. The circuit court's position was that once the physicians had chosen a form of business organization (i.e., professional corporation), they were precluded from arguing that their corporation was essentially a medical partnership among co-equal physicians. Id. at 798. The court held that use of the corporate form precludes any examination designed to determine whether the entity more closely resembles a partnership. Id.

I find that the Dowd case is a better reasoned approach in that it exalts substance over form. With business entities evolving rapidly beyond the standard traditional forms (for example, the new limited liability companies and limited liability partnerships), the question of who is an employee will have to be looked at on the basis of economic realities, because the labels will not answer the question. Further, the Dowd approach is consistent with the approach set out in the

Ninth Circuit's analysis in Strother for the distinction between a true partner and an employee.

Strother directs the court to Look at the true relationship among the individuals, including the method of compensation, the responsibility for the entity's liabilities, and the management structure and role in that management, to determine if an individual should be treated as an employee for the purpose of employment discrimination laws. This is in effect an economic realities test.

The record in this matter indicates that the four physician shareholders of defendant constitute the board of directors. They own the professional corporation, and control the management and operations of the medical practice. They each share in the profits of the professional corporation by annual bonuses. Under Oregon law, they remain personally liable for malpractice claims against them, but have limited liability with respect to corporate obligations.

I conclude that the role of the four shareholders in the defendant professional corporation is that of employers who own and manage their own business. The economic reality is that they are more analogous to partners in a partnership than to shareholders in a general corporation. I conclude that the four physician shareholders are not employees for purposes of the federal antidiscrimination laws. Therefore, I recommend that defendant's motion for summary judgment with respect to the ADA coverage issue granted. There are no genuine issues of material fact. Defendant's physician shareholders are not employees for purposes of the ADA and, thus, the professional corporation is not covered by the ADA.

SUPPLEMENTAL JURISDICTION

28 U.S.C. § 1367, which applies to cases commenced after December 1, 1990, provides the basis for supplemental jurisdiction:

> Except as otherwise provided in subsection (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over ali other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

Subsection (c) of 28 U.S.C. § 1367 gives the court discretion to "decline to exercise" tile supplemental jurisdiction in various circumstances including when "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). The comments to the rule note;

Whether a dismissal of the touchstone claim should bring about a dismissal (or remand, in a removal situation) of the dependent claim for want of supplemental jurisdiction should hinge on the moment within the litigation when the dismissal of the touchstone claim takes place. . . . If for example, the main claim is dismissed early in the action, before any substantial preparation has gone into dependent claims, dismissing or remanding the latter upon declining supplemental jurisdiction seems fair enough.

28 U.S.C.A. § 1367, p. 224 (West Supp. 1991).

In this case, I use my discretion to decline to exercise supplemental jurisdiction over plaintiff's pendent state law claims since it is early in the case and no substantial preparation (other than that necessary to the ADA claim) has gone into the pendent state law claims. Thus, I recommend that plaintiffs pendent state law claims be dismissed without prejudice.

CONCLUSION

Defendant's motion (# 9) for summary judgment, with respect to plaintiff's First Claim for Relief; should be GRANTED. The remainder of defendant's summary judgment motion should be DENIED as moot. Plaintiff's Second and Third Claims for Relief should be DISMISSED without prejudice.

DATED this 22, day of March 2000.

DONALD C, ASHMANSKAS
United States Magistrate Judge

SCHEDULING ORDER

Objections to these Findings and Recommendation(s), if any, are due April 5, 2000. If no objections are filed, the Findings and Recommendation(s) will be referred to a district court judge and go under advisement on that date.

If objections are filed, the response is due no later than April 19, 2000. When the response is due or filed, whichever date is earlier, the Findings and Recommendation(s) will be referred to a district court judge and go under advisement.

Footnote

[1] The Ninth Circuit uses the "economic realities" test to determine employee status. Lutcher v. Musician Union Local 47, 633 F.2d 880, 883 (9th Cir. 1980).

No. 00-35545

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEBORAN ANNE WELLS,
Plaintiff-Appellant,

v.

CLACKAMAS GASTROENTEROLOGY ASSOCIATES PC,
an Oregon corporation,
Defendant-Appellee.

Lower Court Docket Number: CV-99-00406-DCA

Filed June 22, 2001

TIME SCHEDULE ORDER

-> The parties shall meet the following time schedule; Appellant/petitioner shall notify appellee/respondent of transcripts to be ordered, pursuant to Circuit Rule 10-3.1(a);

6/12/00

-> Appellee/respondent shall notify appellant/ petitioner of any additional transcripts needed, pursuant to Circuit Rule 10-3.1(b);

6/22/00

-> Appellant/petitioner shall file transcript order form with the district court and make payment arrangements with court reporter, pursuant to Circuit Rule 10-3.1;

7/3/00

-> Court reporter shall file transcript in the district court, pursuant to FEAP 11(b) and Circuit Rule 11-1.1;

8/2/00